



July 31, 2001

Director, Policy Initiatives and Instructions Branch
Immigration and Naturalization Service
425 Eye St. NW, Room 4034
Washington, DC 20536

VIA FACSIMILE: 202-305-0143

Re: Establishing Premium Processing Service for Employment-Based Petitions and Applications, 66 Federal Register 29682 (6/1/01); Reference No. 2108-01

Dear Sir/Madam:

The following are the comments of the American Immigration Lawyers Association (AILA) to the interim regulation regarding the premium processing program. AILA is a voluntary bar association of more than 7,000 attorneys and law professors who practice and teach in the field of immigration and nationality law. AILA members represent persons, entities and businesses across the immigration spectrum, as well as teach and advocate on all fronts involving immigration issues.

Our members represent a wide spectrum of individuals and entities seeking adjudications from the INS, and thus have the opportunity to recognize the extent and variety of demands placed on the Immigration and Naturalization Service's adjudication arms. It is clear that the INS needs additional resources to address the massive backlog of filings that has built up in most of its offices.¹ However, AILA does not believe that the premium processing program is the way to obtain those resources. Delays have become so profound in many INS offices that rights and opportunities can be lost because of the delays. Children "age out" with the passage of time. Petitioners die. Job offers are lost due to the inability to bring the employee on board in a timely manner. Charging a fee—particularly a fee as substantial as the one attached to this program—means that only those who have substantial financial resources can afford to have true access to

¹ We do believe, however, that INS could better control its waste of resources. Over the past two years, we have seen a marked increase in unnecessary and ill-conceived Requests for Evidence ("RFEs"), which use up a substantial amount of resources. Many of these RFEs request evidence already provided, raise issues unrelated to the standards for the benefit being sought, appear to be unfocused "fishing expeditions," or—all too frequently—display an attempt to re-adjudicate matters already decided by the Service for which there is no reason to believe that either the facts or the law have changed. These needless RFEs are responsible for at least some part of the growing backlogs.

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processing. Paying your way to the front of the line is deeply unfair to those with long-pending petitions and applications.

AILA also is concerned about the impact that premium processing will have on other, regular processing. There is some history (i.e., the push to catch up on naturalization) to cause concern that pouring resources into one area results in other areas falling behind. We recognize that INS believes that it will be able to use the resources obtained from premium processing to improve processing of other petitions, but we worry that, by the time the additional personnel are hired and trained, those other filings will be so severely backlogged that they will be beyond rescue.

Also, if the premium processing program becomes an important source of revenue, INS will have a marked *disincentive* to improve regular processing. We already have seen the first signs of this phenomenon. The Vermont Service Center announced in April that processing times for O and P petitions can be expected to more than quadruple. Petitioners calling to Service Centers to check on their O and P petitions have been told by information officers that fast service on their petitions is now a thing of the past and that “you just have to pay” if you want adjudication within any predictable time frame. This is, in essence, building a market for the product by making the alternative so unattractive that you have no choice but to buy the product, no matter what the cost. Because there is not a competing adjudicative body to send the petition to, petitioners have no alternative but to pay whatever fee INS chooses to charge.

INS should instead look to other funding sources, such as demanding more appropriated funds for these important functions and pricing regular filing fees more realistically for the resources they use.

.Despite our philosophical objections to this program, it appears that the program is going forward. In many respects, the Service’s initial implementation of the new procedures has been efficient and successful. Therefore, AILA would like to comment on some specific aspects of the program as reflected in the interim regulations

Response Time After RFEs, NOIDs, etc.

The interim regulation guarantees only that “the Service will issue an approval notice, notice of intent to deny, request for evidence, or notice of an investigation for fraud or misrepresentation” within 15 days. No mention is made of a guaranteed turnaround time once the petitioner submits a response to the NOID or RFE. In essence, this tells the customer that, for \$1,000, you might get just another delay. The regulation needs to be amended to guarantee a reasonable turnaround time after such notices are answered. We already have seen a significant number of RFEs issued in the premium processing

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program, so it is becoming increasingly clear that such a guarantee will be necessary if the program is to have any credibility.

Keeping Notices Reasonable

Early experience has shown a rash of unreasonable RFEs in response to filings. Whether by coincidence or the result of a peculiarity of how the premium processing program is staffed, AILA members have reported what seems to be a high percentage of RFEs in cases that would rarely have received an RFE in the regular processing lines. While some RFEs have been unusually detailed and reflective of a real effort to review the filing, others have been so boilerplate that wording like “[insert petitioner name here]” has appeared on the RFE. These RFEs do little more than repeat the wording of the regulations without giving any indication of what is the real problem or question about the case. Extra care should always be taken to avoid sending RFEs like this, but it is particularly offensive to petitioners when they have paid an extra \$1,000 for reasonable service.

Obtaining Useable Results

A key area left unanswered by the interim regulation, and causing a problem in the actual practice of the program, is making the result useable to the petitioner and beneficiary within a reasonable time frame. It is not enough that INS approve the petition within 15 days—the item that makes that approval useable must be gotten into the proper hands within 15 days. For changes or extensions of status, this means getting the I-797 notice, complete with attached I-94 card, to the petitioner so that the beneficiary can begin work. For consular notification cases, this means getting the original notice to the petitioner and the notification to the consulate. No provision is made in the interim regulation to guarantee a useable result.

AILA recommends that INS make use of an overnight courier—whether it be USPS Express Mail or a private vendor—to send approval notices to the petitioner and to the consulate. We also strongly suggest that INS fax or otherwise notify the consul, and follow up with the consul to ensure that it received the notification. Indeed, consular notifications have been the area in which AILA members have experienced the most problems with receiving useable results. Extra efforts to achieve these results should be part of anything billed as “premium” service.

Communications

AILA welcomes INS’ experimentation in this program with improved means of communications, and hopes that the Service is sincere in its expressed desire to

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eventually transfer those means to regular processing. The premium processing program advertises a level of communication and responsiveness generally connected with any reasonable customer service operation, but well above the service and communication level offered in regular processing.²

To date, achievement of this communication level has been mixed in the premium processing program. Email communications seem to work well, although sometimes several exchanges are necessary before an issue is understood and worked out. Also, utilization of e-mail communication is uneven among the Service Centers. Vermont should be congratulated for the manner in which it confirms filings under the program. Telephone communication has been more problematic. The CSC premium processing telephone lines frequently do not work, and the automated system often does not recognize premium processing cases as being premium processing. We hope to see these situations improve, not worsen, as more petition types are added to the program.

Regular Expedites

INS is to be applauded for making an exception for non-profits to the requirement that petitioners obtain expedites only through the premium processing program. Unfortunately, however, this exception is largely meaningless, since, unless there is Congressional intervention, most Service Centers grant “traditional” expedites so rarely that there is no real access to such expedites, leaving premium processing as the only option. AILA urges that INS develop clearer criteria for regular expedites, and encourage Service Centers to actually grant such expedites, in order to make this exception meaningful.

Conclusion

As discussed above, AILA continues to object to the principles underlying premium processing. But, since the program has gone forward, we look forward to working with INS to ensure that it operates effectively and that ideas for better service developed in the program can be used at the earliest possible time in regular processing.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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² Meaningful communication by the public with the Service Centers has essentially disappeared in the regular processing lines. If processing of a filing is delayed or otherwise runs into a problem at two of the Service Centers (Texas and California), one can only send a fax. At the other two (Vermont and Nebraska), the only option is to call an already drastically overloaded public information line. Even these means of communication are frequently unavailable. The fax lines at Texas and California are frequently disconnected. The telephone line at Vermont often is out of service, or is busy for days on end.